No. 16-1140

In the
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A/ NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE OPERATION OUTCRY, THE JUSTICE FOUNDATION, AND PRIESTS FOR LIFE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI[1]

Amicus Operation Outcry is a project of Amicus The Justice Foundation. The Justice Foundation is a non-profit organization created to protect the fundamental freedoms and rights essential to preserve American society. The Justice Foundation advocates for the protection of women's health, represents clients on a pro bono basis, litigates cases, and provides education. The Justice Foundation serves at the forefront of protecting women from unsafe abortion practices and provides post-abortive women with a forum to share their abortion experiences.

Operation Outcry has collected over 4,500 legally admissible written testimonies of women hurt by abortion. These testimonies describe the devastating effects of abortion on the women, chronicling a startling array of adverse consequences, including depression, anxiety, suicidal attempts and thoughts, promiscuity, anxiety, drug and alcohol abuse, addiction, and inability to bond with subsequent children. These pathologies led to other adverse consequences, such as economic and social losses through inability to hold steady jobs.

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[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party made any financial contribution toward the preparation of submission of the brief. All parties consented in writing to the filing of this brief.

The Supreme Court has previously cited the Brief of Sandra Cano (the "Jane Doe" of *Doe v. Bolton*) and 180 Women (of Operation Outcry) for the proposition that "some women come to regret" their abortions. "Whether to have an abortion requires a difficult and painful moral decision" and is "fraught with emotional consequence." The Court also noted that "severe depression and loss of esteem can follow" an abortion. *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

The Justice Foundation is currently assisting Melinda Thybault in circulating "The Moral Outcry Petition," which seeks to declare abortion a crime against humanity because of its injurious effect on women and their unborn children. The petition has garnered over 74,000 signatures in seven months, including some from individuals who are working with pregnancy resource centers. [2] These individuals believe abortion to be an egregious human rights violation, yet their ability to communicate this message to abortion-vulnerable women is threatened by the oppressive burdens imposed by the statute.

Amicus Priests for Life is a national, non-profit corporation and the largest pro-life ministry in the Catholic Church. Its mission is to unite, encourage, and train not only clergy, but also the pro-life movement and the general public in advancing a Culture of Life. An important part of

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[2] See "The Moral Outcry Petition" Names, available at https://www.dropbox.com/s/eqdrj9hn3nizyl7/TMO-1-10-18-FINAL.pdf?dl=0 (last visited January 10, 2018)

fulfilling this mission is Priests for Life's work with pregnancy resource centers.

Priests for Life's full-time priests and lay staff travel the country visiting and helping in the work of pregnancy resource centers. Its leaders are invited to address national conferences for associations of pregnancy centers and are speakers at fundraising dinners for local facilities that assist pregnant women. More importantly, two ministries of Priests for Life, the Silent No More Awareness Campaign and Rachel's Vineyard, involve many women who provide one-on-one peer counseling at pregnancy resource facilities.

For over 15 years, the Silent No More Awareness Campaign has been a hub for women and men who regret the abortion of their children. Over 6,000 Silent No More members in 48 states have appeared at high schools, college campuses, special events, and in the media sharing personal testimonies of the trauma they've endured because of abortion. They speak to others from their own abortion experiences. Another ministry of Priests for Life, Rachel's Vineyard, conducts over 1,000 retreats annually for women who seek healing from the pain of their abortions. These retreats are also attended by family members who have lost relatives to abortion and by former abortion clinic workers who seek spiritual and emotional recovery from their involvement in terminating life. Many participants in both of these Priests for Life ministries go on to become peer counselors at pregnancy resource centers.

Much like peer counselors at drug and alcohol rehabilitation centers, the women of

Operation Outcry, Silent No More, and Rachel's Vineyard are not licensed professionals; nevertheless, they have a story to tell and experiences to share. They have a valuable message for women facing an unplanned pregnancy—namely, that there are alternatives to abortion. The effect of the State's mandate is to stifle this message. The ability of amici to communicate their experience by working in association with pregnancy resource centers is compromised by the unnecessary, misleading, and onerous disclosure provisions of the law at issue. The State's notice requirement communicates that their advice and assistance to pregnant women is less valuable than that of licensed abortion providers.

SUMMARY OF THE ARGUMENT

Assembly Bill 775, the Reproductive FACT Act (the Act), contains two distinct mandates, applicable to two distinct types of entities. One mandate applies to facilities licensed to provide a certain level of medical care. The other mandate, the particular subject of this brief, applies to facilities that provide no medical services and are thus not required to be licensed. This second mandate is so burdensome as to effectively preclude these non-medical assistance centers from advertising their free services to women in need. Moreover, it misleadingly implies that the centers are not in compliance with state licensing laws and that its services are inferior to those of licensed

professionals who provide an entirely different type of service.

In seven paragraphs, the Ninth Circuit disposed of Petitioners' challenge to the portion of the Act requiring expensive, impracticable, and message-killing notices in all advertising by these non-professional, non-commercial speakers. Pet. App. 37a – 39a.

First, after toying with the idea that these volunteer non-professionals were in fact engaged in "professional speech," the Ninth Circuit stated that it need not decide that issue, because the mandate survived even strict scrutiny.

The lower court correctly set out the standard under strict scrutiny (the regulation must be narrowly tailored to serve a compelling interest), but then evaluated the mandate in a manner that was anything but strict, or even scrutiny. Relying on unproven legislative findings, the court invoked a compelling governmental interest that is, by definition, inapplicable to these non-medical centers. Its assessment of narrow tailoring consisted of noting that the mandated speech is "only one sentence long;" the court completely ignored both the length of that one sentence and the Act's crushing requirements of where, how, and in how many languages the centers must publish the state-mandated sentence. Nor did the court consider whether more narrowly tailored means would adequately serve the state's purported interests.

In sum, while the Ninth Circuit purported to review the mandate under the correct standard of

strict scrutiny, the review was cursory and, other than the invocation of an inapplicable "compelling" interest, indistinguishable from rational basis review. The court thus cleared a path for government to impose onerous burdens on the disfavored speech of non-professionals, leaving the speech of licensed professionals to be regulated and channeled by the government through other mandates.

ARGUMENT

I. NO COMPELLING GOVERNMENTAL INTEREST SUPPORTS MANDATING DISCLOSURES FROM NON-COMMERCIAL, NON-PROFESSIONAL SPEAKERS.

A. Non-Medical Centers Do Not Provide Medical Services

With virtually no preliminaries, the Ninth Circuit announced that "California has a compelling interest in informing pregnant women when they are *using the medical services* of a facility that has not satisfied licensing standards set by the state." Pet. App. 38a (emphasis added). However, the non-licensed centers do not provide "medical services" as that term is generally understood, i.e., services by a licensed medical professional. Precisely because of state licensing requirements, these centers provide only services that do not require any such licensing, such as the

provision of free or low-cost maternity and baby clothes, diapers, social support services, counseling, education, non-diagnostic ultrasound, and over-the-counter, self-administered pregnancy tests.

The court's feat of verbal legerdemain relies on the unspoken implication that there is a meaning of "medical services" that is broader and that includes non-professional peer counseling and other services ancillary to aiding pregnant women. In the Ninth Circuit's reasoning, pregnancy is a medical condition, and therefore any pregnancy-related service is a medical service.

However, by selectively expanding the meaning of "medical services" to include over-the-counter self-administered pregnancy test kits, information about pregnancy options, free diapers, and educational programs, the court undercut its own pronouncement that the state has a compelling interest in informing women when they are receiving these "medical services" in a facility "that has not satisfied licensing standards set by the state." Pet. App. 38a.

In fact, the state has no licensing requirements for these types of services. If what the Ninth Circuit deems "medical services" can lawfully be provided without a license, then the state has no *compelling* interest in requiring such a disclosure. A state might conceivably be able to articulate some *legitimate* interest in requiring such a disclosure, but a merely legitimate interest is not constitutionally sufficient to support a regulation compelling speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (government may not "dictate the content of speech absent

compelling necessity, and then, only by means precisely tailored").

B. The Asserted Governmental Interest Is Vague and Subjective

The court also formulated the interest at stake as "ensur[ing] that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state." Pet. App. 38a. This exposition contains several erroneous and problematic assumptions

First, as noted above, the unlicensed centers are not "clinics" and do not provide "clinical services," so no women will be using clinical family planning services at these centers. If searching for clinical services, they will not find them at these centers, so there is nothing for the women to be "fully informed" about in terms of who might be providing the services.

Consumers seek out organizations, facilities, businesses, or nonprofits for what they *provide*, not for what they *do not provide*. Women understand that in going to a facility offering free services, they may not be obtaining every service that is otherwise available. A woman may go to a non-medical center for a free pregnancy test and related information – this does not mean that she expects

to get any and every type of medical diagnosis or treatment.

Second, the Ninth Circuit's fuzzy reference to "clinics [women] are trusting with their well-being" (Pet. App. 38a) injects a significant amount of uncertainty and subjectivity into what should be a rigorous statement of the state's compelling interest. Every day, people "trust their well-being" to unlicensed individuals for various reasons. The assumption that the state has a compelling interest in imposing onerous disclosure requirements on individual or facilities who provide non-professional, non-licensed services to enhance the well-being of others is a recipe for state control over speech in many areas, controversial and otherwise.

For example, the state of California has statutorily prohibited mental health professionals from providing "sexual orientation change efforts" ("SOCE") to minors. Cal. Bus. & Prof. Code § 865 (Senate Bill 1172). In upholding this restriction, the Ninth Circuit noted, "Importantly, SB 1172 does not . . . prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults, . . ." *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2014). However, under the Ninth Circuit's reasoning in the instant case, the state could successfully assert a compelling interest in requiring any church or individual offering SOCE from a faith-based or other non-medical perspective to submerge its advertising in disclosures that the counseling is not conducted by licensed professionals. The two modes of regulating the speech of licensed and unlicensed individuals would effectively inhibit the provision of any

counseling in this area, lay or professional, not approved by the state.

The Ninth Circuit's reasoning is not limited to physical or mental health interests. Parents entrust the "well-being" of their minor children to public and private schools. Under the Ninth Circuit's reasoning, the state could claim a compelling interest in requiring private schools that use non-credentialed teachers to include in all their advertising a "conspicuous" notice stating, e.g., "This school employs teachers who are not credentialed by the State of California and have not satisfied the credentialing standards set by the state." Or "This school has teachers on staff who have not been subject to the traditional regulations overseeing professional teachers who are credentialed by the state." Cf. Pet. App. 38a.

This last example highlights another deception in the Ninth Circuit's reasoning. The court claims that the mandated notice "says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics." Pet. App. 39a. But if the state has no message about the relative quality of service between licensed and non-licensed facilities, and if it expresses no preference regarding which type of facility women choose, then how can it have a *compelling* interest in informing women that they are "trusting their well-being" to a non-licensed facility?

Put another way, if the state's interest in warning women that they are "trusting their well-being" to facilities that are not licensed by the

state of California is a *compelling* one, wouldn't that compelling interest in turn dictate that the mandated speech convey more than a non-committal choice between apples and oranges? But the Ninth Circuit claims that, while the state *urgently* needs to convey a warning to women receiving services in non-licensed pregnancy resource centers, the message itself is a neutral one, not expressing any judgment on the quality of the services.

The panel's protestations notwithstanding, the mandated notices do convey a message, a message of disapproval of non-licensed individuals providing counseling and assistance that could theoretically be provided by a state-licensed professional. The state of California wishes to direct the flow of information and assistance to pregnant women into channels it controls through licensing requirements. To that end, it forces those providing non-medical forms of assistance to proclaim their suspect status in a "conspicuous" manner that suggests the facility does not comply with state regulations and is inappropriately providing services that require licensing.

The mandated notice also implies that services provided in a licensed facility or by licensed providers are superior to those provided by those without such licensing. However, particularly in the context of pregnancy options counseling, this assumption lacks empirical support and is itself suspect. The state presented no evidence that pregnant women considering abortion will get more beneficial, helpful, and disinterested advice or assistance from a licensed

doctor running a for-profit abortion clinic than from a lay counselor who, like members of amici Operation Outcry, has had an abortion and lives with the consequences.

Far from furthering a state interest in truth-in-advertising, the Act's mandated notice provision for non-licensed pregnancy care centers is itself false and misleading by implying the necessity or superiority of a license for volunteer pregnancy peer counseling where none is required.

C. The Deference Given To The Legislative Record In Finding A Compelling Governmental Interest Was Erroneous And Inappropriate In The Context Of Strict Scrutiny.

When examining a law under strict scrutiny, the factual assumptions underlying the legislation must be evaluated. It would be an abdication of the judiciary's role to give unbridled deference to legislative findings either to show a compelling government interest or sufficient narrowly tailoring. *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, 439 (1963)(regulatory measures, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011)("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field'...").

In the case of AB 775, the legislative findings include generalizations about the State's desire to make sure that women facing unplanned pregnancies have access to a full range of medical care, presumably necessitating the mandated notices for licensed facilities. Pet. App. 76a-78a. The only legislative finding undergirding the speech mandate imposed on non-medical centers is the assertion that it is "critical that women know whether they are receiving care from licensed medical professionals." Pet. App. 79a. But as a factual basis for a compelling interest in imposing the notice requirement on non-licensed centers, this "finding" fails: not only is it unsupported by empirical evidence, but its basic assumptions are erroneous.

As discussed above, non-licensed pregnancy support centers do not provide medical care. They do not dispense drugs. They do not diagnose medical conditions (including pregnancy). They provide social and physical resources, including peer counseling such as that offered by *Amici Curiae*, referrals to available services, as well as maternity clothes, baby clothes and diapers. Some centers provide a self-administered pregnancy test, free of charge, to women who could also obtain the same test at a supermarket. Some centers provide a keepsake (nonmedical) ultrasound, not used for diagnostic purposes, but providing these ultrasounds is not medical care and is already subject to a written disclosure requirement. Cal. Health & Safety Code § 123620.

None of these services are regulated, nor need they be regulated for the health or safety of

women. Any unlicensed person attempting or purporting to practice healing arts at a pregnancy support center would be liable for the unauthorized practice of medicine. *See* Cal. Bus. & Prof. Code § 2052. Non-medical, non-licensed pregnancy support centers are not medical providers, and do not meet the definition of a "health facility" that is regulated by the Health and Safety Code. *See* Cal. Health & Safety Code § 1250 ("'health facility' means a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness..."). In sum, if these centers or unlicensed individuals volunteering in them did in fact provide medical care, they could and would be prosecuted, no matter how many disclosures they made to women about their unlicensed status.

The legislative history (not findings) of AB 775, relied on by the Ninth Circuit in a single sentence, also contains unsupported, blanket statements about "crisis pregnancy centers." These generalizations include allegations from ideological foes that these centers provide inaccurate information regarding the risks of abortion, use manipulation and shame tactics, and use false and misleading advertising. Neither empirical data nor firsthand accounts supported any of these allegations. A single report issued by the University of California, Hastings College of Law, was cited several times by legislative committees,

but this report contained no empirical data.[3] Instead, it proposed legislative and enforcement actions that might be taken to regulate pregnancy resource centers

In sum, the state failed, both in this lawsuit and in the legislative history itself, to provide even a cursory evidentiary showing to support the asserted "compelling" governmental interest.[4]

II. THE MANDATED NOTICE IS NOT NARROWLY TAILORED

Even if the mandated notice served a compelling governmental interest, that does not end the inquiry under strict scrutiny: "to recite the Government's compelling interests is not to end the matter." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). The First Amendment requires that the Government's chosen regulation of speech be

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[3] Casey Watters, et al., *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information* (2011), available at https://www.heartbeatinternational.org/pdf/CrisisCenterRegulation_Final.pdf

[4] The lack of evidence of an actual problem is not unique to California. Ruling on a challenge to a similar disclosure law targeting pregnancy support centers in Baltimore, the Fourth Circuit recently noted, "After seven years of litigation and a 1,295-page record before us, [Baltimore] does not identify a single example of a woman who entered the Greater Baltimore Center's waiting room under the misimpression that she could obtain an abortion there." *Greater Baltimore Ctr. for Pregnancy Concerns v. Baltimore*, 2018 U.S. App. LEXIS 297 *19-20 (4th Cir. 2018).

narrowly tailored, or "actually necessary," to achieve its interest. *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 799 (2011) Under strict scrutiny analysis, the state bears the burden on the issue of narrow tailoring. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

Other than noting that the mandated notice "is only one sentence long," the Ninth Circuit did not conduct even the most cursory examination of the particular provisions of the Act governing how the notice must be printed. The court did not consider the effect of the mandate on the advertising of non-licensed centers. It did not consider any less burdensome alternatives. Far from being strict, its scrutiny of the regulation was entirely deferential.

A. The Requirements of the Mandated Notice Are Broader and More Burdensome Than Necessary to Serve the Purported Governmental Interest.

The Act's detailed requirements for the mandated notice are more burdensome than necessary.

The Act mandates a bloated, redundant 29-word message, where four or five words would satisfy the purported interest, e.g., "Not a licensed clinic" or "No licensed professionals on staff."

Rather than requiring simply that the font for the notice be of a legible size, the Act mandates that, for both web and print advertising, the font be larger than the surrounding text or in some other manner made "conspicuous" by standing out from

the surrounding text. In other words, the Act mandates that the non-licensed centers design their advertisements to make the state-mandated speech *more* prominent than their own message.

The Act mandates that the state's message be printed in English and the "primary threshold languages for Medi-Cal beneficiaries . . . for the county in which the facility is located." Pet. App. 82a. For example, to comply with the Act, Petitioner Pregnancy Care Clinic must include, in ***all*** of their advertisements, the following:

This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

* Este establecimiento no tiene licencia como instalación médica por parte del Estado de California y no tiene un proveedor médico con licencia que proporcione o supervise directamente la prestación de servicios. *

* هذا مرفق غير مرخص كمرفق طبي من قبل ولاية كاليفورنيا ليس لديه مزود طبي مرخص يقدم أو يشرف مباشرة على تقديم الخدمات *

* Cơ sở này không được Nhà nước California cấp phép như một cơ sở y tế và không có nhà cung cấp dịch vụ y tế được cấp phép cung cấp hoặc trực tiếp giám sát việc cung cấp dịch vụ.*

* این مرکز به عنوان مرکز پزشکی ثبت نشده و مجوز ارائه دهنده پزشکی قانونی ندارد و مستقیماً بر ارائه خدمات نظارت می کند. *

* ito ay hindi ng may pahintulot na gaya ng isang medikal sa pamamagitan ng estado ng california may pahintulot na nagkakaloob medikal at wala na siyang nagbibigay ng tuwiran o supervises ang pagkain ng mga paglilingkod. *

If a center's own advertising is not printed in these other languages, the mandate is hardly narrowly tailored in requiring a disclosure of the non-licensed status of the facility in those languages. A narrowly tailored requirement might require, at most, the mandated notice to appear only in the same language used in the advertisement itself.

The Act mandates that the state's message be included in all print and digital advertising material, regardless of the size or format of the advertisement or audience of the particular form of advertising. While the exact meaning of "advertising material" is uncertain, it doubtless includes most traditional advertising as well as many emerging forms of advertising. In fact, the mandate appears so broad as to include every outreach made by a non-medical center, creating problems ranging from significant to insurmountable.

For example, the dozen words printed in a small phone book ad or bus or subway sign ("Pregnant? Think You Might Be? We're Here to Help. Call 888-555-1212") is more than tripled by the addition of the mandated 29-word notice in only one language. Not only is the center's own message crowded out, but the cost of the advertisement also increases substantially. Pet. App. 32a – 33a. A simple organization name and logo on a T-shirt would be transformed into something ridiculous.

Under the Act, non-medical centers are completely foreclosed from advertising on the Internet, as these platforms have limitations on the number of characters in advertisements. Indeed, at 153 characters, the wordy and redundant state-

mandated notice alone, in just one language, is almost double the 80-character limit for a GoogleAd. Pet. App. 33a.[5]

The "one sentence long" mandated notice is burdensome and not narrowly tailored to serve the purported governmental interest.

B. The Ninth Circuit Failed to Consider Narrowly Tailored Alternatives

Assuming *arguendo* that there was some empirical evidence of pregnancy support centers misleading clients or potential clients (which there is not), a state-wide mandate applicable to every center nonetheless fails to meet the constitutional requirement of narrow tailoring. A regulation of speech is not narrowly tailored if less restrictive alternatives are "readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

The state has other tools in its toolbox to address the alleged problems of centers engaging in deceptive advertising or misleading of potential clients, none of which the Ninth Circuit considered. The state could, as recommended in the report commissioned from U.C. Hastings College of Law, have simply focused on enforcing existing laws against false advertising. *Riley, supra*, 487 U.S. at 800 (vigorous enforcement of antifraud laws is more narrowly tailored than "prophylactic,

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[5] See Google AdWords Help, available at https://support.google.com/adwords/answer/1704389?hl=en (last visited January 10, 2018).

imprecise, and unduly burdensome" disclosure requirements on solicitations). Legislatively, it could have created a private right of action for those actually harmed by alleged deceptive practices of pregnancy care centers.

The Legislature might also have adopted a law like an existing San Francisco ordinance, which authorizes courts to order remedial steps upon a finding that a particular center has engaged in deceptive advertising. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1270 (9th Cir. 2017) (upholding S.F. Admin. Code, ch. 93 § 93.5, creating cause of action by city attorney for injunctive relief; court may order remedial disclosure requirements upon finding that center's advertising is false, misleading, or deceptive). While this approach may suffer from other constitutional infirmities, such as the singling out of pregnancy care centers, it also demonstrates the existence of more narrowly tailored alternatives than the broad prophylactic approach chosen by the Legislature.

While the state has considerable latitude in protecting public health and preventing deceptive advertising, the compelled speech of AB 775 is too loose a fit to those ends to survive strict scrutiny, and in fact creates its own deception by mandating a warning of "non-licensure" where no licensure is required or even obtainable.

CONCLUSION

Strict scrutiny is, as the name implies, a demanding standard; it is a "'rare case' in which a

State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656, 1665 (2015). Petitioners' challenge to AB 775 is not such a case.

The Act satisfies neither element of the strict scrutiny test. It does not serve even an intelligible, much less a compelling, governmental interest. Moreover, it is not narrowly tailored to further the purported interest identified by the court below. This Court should reverse the Ninth Circuit and find AB 775 unconstitutional.

Respectfully submitted,

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